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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 133

R. B. JAMES, ET AL., PETITIONERS,

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 2a-5a) is reported at 253 F. 2d 78.

JURISDICTION

The judgment of the court of appeals (Pet. 1a-2a) was entered on February 7, 1958, a petition for rehearing was denied on March 31, 1958 (Pet. 5a), and the final order enforcing the Commission's cease-and-desist order was entered on April 7, 1958 (Pet. 5a-7a). The petition for a writ of certiorari was filed on June 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the interstate sale and distribution of punchboards and pushcards used for selling merchandise by lot or chance is an unfair act or practice under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In January 1956, the Federal Trade Commission issued a complaint charging petitioners with unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U.S.C. 45), by sale and distribution in interstate commerce of punchboards and pushcards for use in selling merchandise by lottery or chance (App. 7a).[1] After hearing, the Commission held that petitioners had violated the act and issued a cease-and-desist order, which the court of appeals unanimously affirmed and enforced.

The Commission made the following findings of fact:

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[1] "App." refers to the Appendix to respondent's brief in the court of appeals.

Petitioners sell and distribute in interstate commerce devices known as pushcards and punchboards, designed for use by retail dealers in selling merchandise to the public by a game of chance (App. 4a-5a). In 1954 and 1955, petitioners' annual sales were roughly $500,000 (App. 5a).

The various types of punchboards and pushcards sold by petitioners differ in detail, but all "involve the same feature of chance or lottery." (App. 5a.) Upon the payment of a specified amount, the purchaser is entitled to one punch or push from the punchboard or pushcard. A number, previously concealed, is thereupon disclosed. A purchaser who picks a winning number receives an article of merchandise, without additional cost, at a price which is substantially less than the normal retail price of such article; purchasers who do not select a lucky number receive no merchandise. Articles of merchandise are thus distributed to the public wholly by lot or chance (App. 5a).

Many business enterprises which sell and distribute merchandise in interstate commerce have purchased petitioners' punchboards and pushcards, have packaged assortments consisting of merchandise and petitioners' devices, and have vended such assortments to retailers for resale to the public (App. 6a).

The Commission ordered petitioners to cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public

by means of a game of chance, gift enterprise or lottery scheme [App. 7a].

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no occasion for further review by this Court. It rests upon the long settled rule that the Commission may prevent the interstate distribution of gambling devices used for marketing merchandise. In *Federal Trade Commission* v. *R. F. Keppel and Bro.*, 291 U.S. 304, this Court unanimously held that it was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act to distribute in interstate commerce penny candy assortments, where the resale price depended upon chance. Commission orders prohibiting the interstate distribution of punchboards and pushcards have been sustained by courts of appeals in every circuit in which their validity has been litigated, and this Court has consistently refused to review such decisions.[2]

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[2] Among the more recent cases are *Seymour Sales Co.* v. *Federal Trade Commission*, 216 F. 2d 633 (C.A.D.C.), certiorari denied, 348 U.S. 928; *U.S. Printing & Novelty Co.* v. *Federal Trade Commission*, 204 F. 2d 737 (C.A.D.C.), certiorari denied, 346 U.S. 830; *Halseth* v. *Federal Trade Commission*, C.A. 7, No. 11,022, September 15, 1954, certiorari denied, 348 U.S. 928; *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (C.A. 9), certiorari denied, 346 U.S. 814; *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C.A. 9), certiorari denied, 344 U.S. 819; *Bee Jay Products, Inc.* v. *Federal Trade Commission*, 204 F. 2d 272 (C.A. 10), certiorari denied, *sub nom. Universal Mfg. Co.* v. *Federal Trade Commission*, 346 U.S. 856. See also *Hamilton Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C.A.D.C.); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F. 2d 444 (C.A. 3); *Consolidated Mfg. Co.* v. *Federal Trade Commission*, 199 F. 2d 417 (C.A. 4); *Charles A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C.A. 6); *Zitserman*

Petitioners' sole contention (Pet. 3-4)—that the ruling of the court of appeals is in conflict with this Court's decision in *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349—is without merit. In that case, the Court held that the Commission's power under Section 5 is limited to practices employed "in" interstate commerce, and does not authorize the Commission to forbid the exclusively intrastate marketing of products by means of a gambling device. Since petitioners admittedly "sell punchboards and pushcards in interstate commerce * * *" (Pet. 3), the *Bunte Brothers* case is, as the court of appeals pointed out (Pet. 4a), "inapposite." See *Zitserman* v. *Federal Trade Commission,* 200 F. 2d 519, 523 (C.A. 8), and cases there cited.

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v. *Federal Trade Commission,* 200 F. 2d 519 (C.A. 8); *Bork Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 611 (C.A. 9); *Gay Games* v. *Federal Trade Commission,* 204 F. 2d 197 (C.A. 10).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1958.

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